

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CENTER FOR ENVIRONMENTAL
LAW AND POLICY, a Washington
non-profit corporation, and
COLUMBIA RIVERKEEPER, a
Washington non-profit corporation,

Plaintiffs,

v.

UNITED STATES BUREAU OF
RECLAMATION, an agency of the
Department of the Interior, and
MICHAEL L. CONNOR, in his
official capacity as Commissioner of
the Bureau of Reclamation,

Defendants.

NO. CV-09-160-RHW

**ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

Before the Court are Plaintiffs' Motion for Summary Judgment (Ct. Rec. 68) and Defendants' Cross Motion for Summary Judgment (Ct. Rec. 82). A hearing on these motions was held on April 14, 2010. For the reasons set forth below, the Court grants Defendants' motion and denies Plaintiffs'.

I. BACKGROUND

The Center for Environmental Law and Policy and Columbia Riverkeeper sued the United States Bureau of Reclamation and Michael L. Connor for violations of the National Environmental Policy Act ("NEPA"). Plaintiffs allege that Defendants failed to release a timely Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") on the Lake Roosevelt Drawdown Project, contrary to NEPA requirements. After this action began, Defendants

1 completed an EA and issued a Finding of No Significant Impact (“FONSI”).
2 Plaintiffs complain that these measures were both untimely and inadequate.
3 Plaintiffs request a declaratory judgment that Defendants violated NEPA, and also
4 request injunctive relief to prevent Defendants from taking action related to the
5 Project.

6 This case arises out of Defendant Bureau of Reclamation’s Columbia Basin
7 Project (“CBP”), which annually diverts 2.65 million acre-feet of water from the
8 Columbia River for irrigation. The CBP also includes the Grand Coulee Dam,
9 which generates hydroelectric power from the flow of the Columbia River.
10 Defendant has currently completed the first half of the CBP, and now seeks to
11 engage in a phased development of the second half. This includes the project at
12 issue here: the Lake Roosevelt Incremental Storage Releases Project, also known
13 as the Lake Roosevelt Drawdown Project. This project seeks to annually divert
14 tens of thousands of acre-feet of water from Lake Roosevelt, the reservoir formed
15 behind Grand Coulee Dam, for irrigation use in the Odessa Subarea. The Project
16 would decrease the level of Lake Roosevelt by one foot in most years, and by 1.8
17 feet in drought years (approximately once every 26 years).

18 In 2004, the Bureau of Reclamation entered into a Memorandum of
19 Understanding (“MOU”) with Washington State and the three irrigation districts
20 served by the CBP (one of whom intervenes here on behalf of Defendants). The
21 MOU details the parties’ plans to work together to increase the availability of
22 Columbia River water for various uses through projects including the Lake
23 Roosevelt Drawdown Project. The MOU also acknowledges that the Bureau of
24 Reclamation’s action were subject to compliance with Reclamation law, including
25 NEPA.

26 Two years later, Washington State enacted legislation directing the
27 Department of Ecology to “aggressively pursue the development of instream and
28 out-of-stream [water] uses,” including releases of water from Lake Roosevelt.

1 RCW 90.90.005. In response, Ecology developed a policy advisory group
2 composed of various tribal and local governments, federal and state agencies, and
3 stakeholder groups. In 2007, Washington State signed Water Resources
4 Management Agreements with the Confederated Tribes of the Colville Reservation
5 and the Spokane Tribe of Indians, in which the state “agreed to provide annual
6 payments to the tribes to mitigate potential damage to fish and wildlife, recreation
7 and cultural activities resulting from the release of water from Lake Roosevelt, and
8 for economic development investments to benefit the local economy.” (Final EA,
9 LR-A000023).

10 In 2005, the Bureau of Reclamation submitted a water rights application to
11 the Department of Ecology for the Lake Roosevelt Drawdown Project. The Bureau
12 later withdrew this application and submitted amended applications in 2008.
13 Ecology issued two secondary water use permits for the Lake Roosevelt Project on
14 December 1, 2008. Plaintiffs filed this lawsuit the same day. Defendants thereafter
15 released a draft EA on March 20, 2009, and a final EA and FONSI on June 12,
16 2009, and Plaintiffs amended their Complaint accordingly. Previously, the Court
17 permitted Vision for Our Future, an environmental organization located within the
18 jurisdiction of the Confederated Tribes of the Colville Indian Reservation, to
19 intervene as a Plaintiff, and East Columbia Basin Irrigation District and the
20 Washington State Department of Ecology to intervene as Defendants.

21 II. APA STANDARD OF REVIEW

22 The parties agree that the Court’s standard of review is set by the
23 Administrative Procedure Act (“APA”), 5 U.S.C. § 706. Under the APA, the Court
24 must determine whether the Board’s decision was “arbitrary, capricious, an abuse
25 of discretion, or otherwise not in accordance with law.” If the Court can “examine
26 the relevant data and articulate a rational connection between the facts found and
27 the choice made,” Defendants’ decision should be affirmed. *Friends of Yosemite*
28 *Valley v. Kempthorne*, 520 F.3d 1024, 1032 (9th Cir. 2008) (quoting *Pub. Citizen*

1 v. *DOT*, 316 F.3d 1002, 1020 (2003)).

2 III. DISCUSSION

3 Plaintiffs make two basic arguments: that Defendants violated NEPA by
4 beginning to implement the Project before complying with NEPA, and that the EA
5 Defendants later prepared was flawed in three respects.

6 **A. Timing of the EA**

7 Plaintiffs first argue that Defendants violated NEPA's strict timing
8 requirements by beginning implementation of the Project before preparing NEPA
9 documentation and soliciting public comments. Plaintiffs cite NEPA's
10 implementing rules, providing that "[u]ntil an agency issues a record of decision...
11 no action concerning the proposal shall be taken which would: (1) Have an adverse
12 environmental impact; or (2) Limit the choice of reasonable alternatives." 40
13 C.F.R. § 1506.1(a); *see also Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)
14 ("An assessment must be prepared early enough so that it can serve practically as
15 an important contribution to the decisionmaking process and will not be used to
16 rationalize or justify decisions already made.") (internal quotations and citations
17 omitted).

18 Plaintiffs argue that Defendants impermissibly limited the range of
19 reasonable alternatives by (1) entering into the MOU before engaging in the NEPA
20 process; and (2) seeking and obtaining water rights required to implement the
21 Project, and only later approving the Project through an EA and FONSI. According
22 to Plaintiffs, these "water rights committed the agency to a course of action that
23 precluded alternatives to achieve the goals of the Project, most notably employing
24 water conservation alternatives to supply new uses and/or providing more water for
25 instream flows." (Plaintiffs' Memorandum in Support, Ct. Rec. 69, p. 9). Plaintiffs
26 compare these facts to those of several cases in which the Ninth Circuit held that
27 agencies violated NEPA by irretrievably committing themselves to courses of
28 action before engaging in the NEPA process. *See, e.g., Pit River Tribe v. U.S.*

1 *Forest Service*, 469 F.3d 768, 782-83 (9th Cir. 2006) (finding that leases and lease
2 extensions were an irreversible commitment where the leases did not reserve to the
3 agencies “an absolute right to deny exploitation of those resources,” and preserved
4 only the agencies’ rights to limit development when not inconsistent with the lease
5 rights); *Metcalf*, 214 F.3d at 1143-44 (agency violated NEPA by committing to a
6 whaling proposal in writing and only later preparing a “slanted” EA); *Conner v.*
7 *Burford*, 848 F.2d 1441, 1451 (agency violated NEPA by failing to prepare NEPA
8 documents before selling leases that relinquished “the ability to prohibit potentially
9 significant inroads on the environment”).

10 Defendants respond by first pointing out that the EA and FONSI at issue
11 here were not created in a vacuum, but instead relied heavily on and incorporated
12 Environmental Impact Statements prepared by the Washington Department of
13 Ecology in 2007 and 2008. Defendants thus argue that the EA at issue here reflects
14 “the ongoing cooperative work being undertaken by the State and Federal
15 Government agencies.” (Defendants’ Memorandum in Support, Ct. Rec. 83, pp.
16 10-11).

17 Defendants next argue that the MOU did not constitute an irreversible
18 commitment. Defendants cite the language of the MOU itself, which sets forth the
19 parties’ commitment only to “use their best efforts in working collaboratively and
20 in good faith to secure economic and environmental benefits from improved water
21 management both within the federal Project and along the mainstem of the
22 Columbia River by advancing the actions described in this MOU.” (LR-B004239,
23 § 3). Defendants also point out that the MOU expressly specified that it created no
24 legal obligations binding any of the parties, and that no existing water supplies or
25 water rights would be impaired as a result of the MOU. Defendants thus
26 distinguish the MOU from the agreements at issue in *Metcalf*, where an agency
27 would have incurred liability for breaching a contract entered into before preparing
28 an EA. 214 F.3d at 1144.

1 Defendants also dispute Plaintiffs' argument regarding the water rights
2 permits, arguing that "mere possession of a water right does not trigger any action
3 because the holder cannot perfect that right *until* that water has been applied to a
4 recognized beneficial use." (Ct. Rec. 83, p. 14) (citing RCW 90.03.320).
5 Defendants concede that if they had taken some action to divert and use water
6 under the permits, such action would trigger a duty to comply with NEPA.
7 However, Defendants argue that the sequence of events here complies fully with
8 NEPA, because Defendants issued a final EA and FONSI before taking any such
9 action.

10 As noted above, Defendants attempt to distinguish *Metcalf* at length by
11 arguing that neither the MOU nor the water use permits irretrievably committed
12 Defendants to any course of action, unlike the binding contracts the agencies
13 signed in *Metcalf*. Moreover, Defendants point out that *Metcalf* itself states that
14 "this case does not stand for the general proposition that an agency cannot begin
15 preliminary consideration of an action without first preparing an EA, or that an
16 agency must always prepare an EA before it can lend support to any proposal." 214
17 F.3d at 1145.

18 Plaintiffs concede in their reply that the MOU did not trigger NEPA's
19 requirements. However, Plaintiffs argue that the water use permits constituted an
20 irrevocable commitment because Defendants could not proceed with a project that
21 used water in any other way than that authorized in the permits. Plaintiffs also
22 reiterate their argument that the permits constituted a point of commitment that
23 effectively foreclosed the consideration of any "non-diversion" alternatives.
24 (Plaintiffs' Reply Memorandum, Ct. Rec. 89, p. 9).

25 Defendants reply that "from both a legal and practical perspective, there is
26 nothing impermissible or inappropriate in the Bureau's considering the Project in
27 2004, working closely with Ecology to develop the proposal, but waiting until
28 2008 to prepare the EA, once it developed a discrete proposal for federal action."

(Defendants' Reply Memorandum, Ct. Rec. 93). Defendants point out that the real issue before the Court is not when project consideration began, but whether Defendants complied with NEPA requirements "before taking action with environmental impacts or limiting a choice of reasonable alternatives."

The Court finds that Defendant's final point here is the key question: did obtaining the permits improperly limit the EA's scope of reasonable alternatives? If so, it constituted the "go-no-go" point of commitment that itself triggered NEPA requirements. If not, then Defendants properly waited until after the permits were obtained to prepare an EA. The Court can only answer this question by looking at the EA's consideration of alternatives. In other words, what Plaintiffs set out as a separate argument about timing is in fact subsumed within Plaintiffs' overall challenge to the sufficiency of the EA. If that EA, including its consideration of alternatives, is sufficient, then the sequence of events here would not violate NEPA.

B. Sufficiency of the EA

Plaintiffs challenge three aspects of the EA: (1) its consideration of cumulative effects; (2) its consideration of indirect impacts; and (3) its consideration of reasonable alternatives.

1. Cumulative Effects

Even where the identifiable impacts of a specific project are insignificant, significantly cumulative impacts "can result from individually minor but collectively significant actions taking place over a period of time." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 868 (9th Cir. 2005) (internal quotations omitted). "[I]n considering cumulative impact, an agency must provide some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Id.* (internal quotations omitted).

1 Plaintiffs argue that the final EA fails to take a “hard look” at cumulative
2 impacts, and instead “relies on general statements about possible effects and fails
3 to provide any quantified and detailed information on the cumulative impacts.” (Ct.
4 Rec. 69, p. 11). Plaintiffs note that the final EA’s section on cumulative impacts is
5 only one page and a half, and relies heavily on the cumulative impacts analysis in
6 Ecology’s programmatic EIS. Plaintiffs point out that the final EA does not discuss
7 any specific past actions. Plaintiffs argue that the final EA’s conclusion that no
8 significant cumulative impacts would occur because the impacts of the Project
9 would be small to immeasurable “omits the heart of the cumulative impacts
10 analysis by failing to *add* the incremental impacts of the Project to past, present,
11 and reasonably foreseeable future actions.” (Ct. Rec. 69, p. 13) (emphasis in
12 original). Plaintiffs liken this case to *Klamath-Siskiyou Wildlands Ctr. v. Bureau of*
13 *Land Management*, 387 F.3d 989, 993-96 (9th Cir. 2004), where the Ninth Circuit
14 found inadequate a generalized cumulative impacts section of an EA that failed to
15 take into account the combined effects of reasonably foreseeable future actions.

16 Federal Defendants do not address this issue, but instead defer to Intervener-
17 Defendant Washington Department of Ecology. Ecology describes the analyses of
18 its two environmental impact statements (incorporated by reference into this EA)
19 and argues that the statements “taken together contain an exhaustive discussion of
20 the potential impacts, positive and negative of the Project, including the potential
21 cumulative effects of additional projects.” (Ecology’s Memorandum in Response,
22 Ct. Rec. 79, p. 9). Ecology attempts to distinguish *Klamath-Siskiyou* by arguing
23 that “the present action is not one of a series of similar actions that taken together
24 may have cumulative effects... the Project does not involve a new diversion from
25 the River but instead involves making better use of an existing diversion that was
26 authorized in 1938.” (Ct. Rec. 79, p. 10). Ecology argues that an exhaustive
27 discussion of the history of related projects is unreasonable, citing *League of*
28 *Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1217-18 (9th Cir. 2008)

1 (holding that an agency may consider cumulative effects in the aggregate, rather
2 than delving into the historical details of individual past actions). Ecology also
3 argues that the final EA need not consider the effects of future projects that are
4 currently speculative, including the Odessa Subarea Special Study.

5 Plaintiffs reply by first arguing that federal agencies cannot “tier” to a non-
6 NEPA document. “Tiering” is a process by which a narrow EA or EIS can refer to
7 a previous broader EIS’s coverage of general matters. 40 C.F.R. § 1508.28. The
8 final EA stated that it was incorporating Ecology’s two EISs under NEPA’s
9 regulations providing that “agencies shall incorporate material into an
10 environmental impact statement by reference when the effect will be to cut down
11 on bulk without impeding agency and public review of the action.” 40 C.F.R. §
12 1502.21. Federal Defendants’ memo argued that the Bureau of Reclamation was
13 permitted to “tier” the final EA off of Ecology’s two EISs. (Ct. Rec. 83, p. 19).

14 However, Plaintiffs point to Ninth Circuit case law holding that “tiering to a
15 document that has not itself been subject to NEPA review is not permitted.”
16 *League of Wilderness Defenders*, 549 F.3d at 1219 (quoting *Kern v. U.S. BLM*, 284
17 F.3d 1062, 1073 (9th Cir. 2002)). Plaintiffs also argue that 40 C.F.R. § 1502.21, on
18 which the final EA relied, applies to EISs, not EAs, and that at least one district
19 court has held that NEPA’s regulations do not allow for incorporation by reference
20 in an EA. *Natural Res. Defense Council v. Duvall*, 777 F. Supp. 1533, 1538-39
21 (E.D. Cal. 1991). Even if the Court can consider the EA’s incorporation of the two
22 EISs by reference, Plaintiffs argue that the documents fail to meet federal NEPA
23 standards.

24 Federal Defendants concede that the concept of “tiering” was misused in
25 their initial memorandum in support. (Defendants’ Reply Memo, Ct. Rec. 93, p. 7).
26 However, Defendants maintain that incorporation by reference in an EA is
27 encouraged by the regulations, notwithstanding the district court case Plaintiffs
28 cite. In support, Defendants cite the Council for Environmental Qualities’ “Forty

1 Most Asked Questions Concerning CEQ's NEPA Regulations," 46 Fed. Reg.
2 18026, which provides that EA may incorporate background material by reference.

3 On the issue of incorporation by reference, the Court finds that Defendants
4 have the better of argument. *Duvall* reasoned that EAs should stand on their own
5 and provide sufficient information within their four corners to facilitate public
6 comment. 777 F. Supp. at 1538-39. While that is true, the Court sees no reason
7 why an EA could not refer to other documents so long as it sufficiently summarizes
8 the relevant portions of those documents, as this final EA does. Moreover, it would
9 be wasteful and inefficient for a federal agency to simply copy and paste a state
10 agency's work where, as here, that work is the result of a long ongoing
11 collaboration between the two agencies. Therefore, the Court finds that the final
12 EA's incorporation of the two EISs is appropriate.

13 After reviewing the final EA and Ecology's two EISs, the Court concludes
14 that the cumulative impacts analysis here complies with NEPA. While the relevant
15 section of the final EA is brief, the document as a whole and the prior documents it
16 incorporates contain a thorough discussion of the history of development of the
17 region and the place of the Lake Roosevelt Drawdown Project within that history.
18 Most importantly, Plaintiffs fail to identify any specific projects that Defendants
19 failed to consider. While Plaintiffs make much of the Odessa Subarea Special
20 Study, it is abundantly clear from the record that Defendants considered that
21 project in response to comments, in the body of the final EA, and in the FONSI.
22 Defendants point out that no alternatives currently under consideration in the
23 Odessa Subarea project have been determined to be feasible, and therefore it is
24 unclear at this stage whether the project will even go forward. Given those
25 circumstances, the project appears far from "reasonably certain," and the Court
26 cannot conclude that Defendants' treatment of the project in the cumulative effects
27 analysis was arbitrary or capricious.

28 The Court agrees with Defendants that these circumstances are substantially

1 distinct from those in *Klamath-Siskyou*, 387 F.3d at 993-96. There, federal
2 agencies prepared NEPA documents on several projects proceeding
3 simultaneously, yet failed to adequately consider the cumulative impacts of the
4 projects taken together. In contrast, the project at issue here is not a companion
5 project to any other federal actions under consideration, because any future
6 projects in the region remain too speculative to fully analyze at this stage. While
7 the Lake Roosevelt Drawdown Project does not exist in a vacuum, the NEPA
8 documents at issue thoroughly account for the history of development in the region
9 and the project's cumulative impacts thereto. Accordingly, the Court finds that the
10 final EA and FONSI comply with NEPA's cumulative impacts analysis
11 requirement, and rejects Plaintiffs' argument on this issue.

12 *2. Indirect Effects*

13 NEPA's implementing regulations also require the consideration of
14 reasonably foreseeable "indirect effects," which "may include growth inducing
15 effects and other effects related to induced changes in the pattern of land use,
16 population density or growth rate, and related effects on air and water and other
17 natural systems, including ecosystems." 40 C.F.R. § 1508.8(b).

18 Plaintiffs argue that the increased surface water supply authorized under the
19 Project would induce growth within the CBP and in downstream municipalities
20 and industry. Plaintiffs argue that the EA entirely fails to consider the indirect
21 impacts this induced growth may have. Plaintiffs argue that the Project will
22 facilitate development of the Odessa Subarea, but the final EA fails to address this
23 indirect impact. Finally, Plaintiffs argue that the EA also fails to consider what
24 impacts the Project may cause by facilitating "a host of new growth and activities
25 along the Columbia River." (Ct. Rec. 69, p. 16).

26 Ecology responds by arguing that these kinds of indirect impacts were
27 discussed in the PEIS, which is again incorporated by reference into the final EA.
28 Ecology cites the PEIS's discussion of effects on socioeconomics and land use in

1 the Odessa and downstream communities, concluding that the increased water
2 supply would allow the continuation of existing agricultural activities. The PEIS
3 also concluded that the growth the Project might induce in small and widespread
4 communities is uncertain, and any new projects would be subject to both
5 municipalities' own growth management plans and independent environmental
6 review.

7 Plaintiffs reply that a major proposed component of the Project, the Weber
8 Siphon expansion, had not "crystallized" at the time the PEIS was written, and thus
9 was not considered in that document. (Plaintiffs' Reply Memo, Ct. Rec. 89, pp. 15-
10 16). Plaintiffs also argue that the final EA fails to summarize and disclose the
11 portions of the PEIS on which it relies with respect to indirect impacts. Finally,
12 Plaintiffs argue that reliance on communities' own growth management plans
13 (which two counties at issue lack) cannot by itself render the Project's indirect
14 impacts insignificant.

15 As with the EA's and EISs' analysis of cumulative impacts, the Court
16 concludes that these documents' consideration of indirect impacts is sufficient. The
17 PEIS does go into substantial detail about foreseeable indirect impacts, and also
18 explains why certain elements of growth are speculative and uncertain. *See* LR-
19 B003989-90. The EA summarizes and incorporates this analysis. *See* LR-A000060,
20 62. Like its impacts on the Odessa Subarea project, the indirect impacts the Lake
21 Roosevelt Drawdown Project may have on communities' growth remains
22 speculative at this stage. Any such indirect impacts will be subject to multiple
23 factors outside of Defendants' current control, including communities' own
24 choices about growth and future projects' compliance with state and federal
25 environmental law. Accordingly, the Court finds that Defendants' analysis of
26 indirect impacts complies with NEPA, and denies Plaintiffs' motion on this basis.

27 *3. Reasonable Alternatives*

28 "NEPA requires the agencies to 'study, develop, and describe appropriate

1 alternatives to recommended courses of action in any proposal which involves
2 unresolved conflicts concerning alternative uses of available resources.” *N. Idaho*
3 *Cnty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1153 (9th Cir.
4 2008) (quoting 42 U.S.C. § 4332(2)(E)). This provision requires agencies “to give
5 full and meaningful consideration to all reasonable alternatives,” and applies to
6 both an EIS and an EA. *Id.* However, agencies have a lesser obligation to consider
7 obligations in an EA, and need only include “a brief discussion of reasonable
8 alternatives.” *Id.* Under this lesser obligation, consideration of only two
9 alternatives (a no action alternative and a preferred alternative) may suffice. *Id.* at
10 1153-54. Agencies may define reasonable alternatives as those that serve a
11 project’s identified purpose and need, but “[a]n agency may not define the
12 objectives of its action in terms so unreasonably narrow that only one alternative
13 from among the environmentally benign ones in the agency’s power would
14 accomplish the goals of the agency’s action.” *Nat’l Parks & Conservation Ass’n v.*
15 *Bureau of Land Mgmt.*, 586 F.3d 735, 746 (9th Cir. 2009) (internal quotation
16 omitted).

17 The final EA considers two alternatives: a no-action alternative and the
18 proposed project. Plaintiffs argue that Defendants unreasonably limited the scope
19 of alternatives by narrowly defining the goal of the Project: “to improve water
20 management in the Columbia River Basin by *releasing additional water* from Lake
21 Roosevelt.” (LR-A000016, emphasis added). Plaintiffs argue that by treating the
22 release of additional water as a given, Defendants overlooked several reasonable
23 alternatives that do not include the release of additional water, such as: (1)
24 increased water conservation measures; (2) water markets that transfer water to
25 more valuable areas; and (3) reversion from irrigated to dry-land farming in key
26 areas. (Plaintiffs’ Statement of Facts, Ct. Rec. 70, p. 23).

27 Ecology argues that the final EA expressly relies on the SEIS’s discussion of
28 alternatives. The SEIS, in turn, incorporated the PEIS’s discussion of alternatives.

1 The SEIS discusses at least two of the alternatives suggested in Plaintiffs' briefing
2 – conservation and water markets – and declines to “carry them forward.” (LR-
3 B002166 – 68). Ecology argues that the Bureau of Reclamation “was entitled to
4 rely on the States' alternatives analysis and was under no obligation to address
5 alternatives the State had already eliminated.” (Ecology's Memo in Response, Ct.
6 Rec. 79, p. 16).

7 Plaintiffs reply that the final EA does not actually summarize and discuss
8 any portions of the PEIS and SEIS on which the EA's alternatives analysis relies.
9 Regardless, Plaintiffs argue that the alternatives analysis in the two state
10 documents is inadequate. Plaintiffs point out that even though the SEIS briefly
11 discusses some alternatives it does not carry forward, the heart of the SEIS's
12 alternatives section considers only two alternatives: the proposed project, in
13 different forms, and a no-action alternative. Plaintiffs again reiterate their argument
14 that the final EA's narrow definition of purpose impermissibly limited the scope of
15 available alternatives.

16 Ecology replies that Plaintiffs appear to “confuse the rejection of these
17 alternatives with a failure to analyze them.” (Ecology's Reply Memo, Ct. Rec. 95,
18 p. 9). Ecology reiterates the SEIS's conclusion that “conservation and water
19 marketing... do not by themselves meet the legislative directive to develop a variety
20 of water supply options and distribute the water to a variety of end users,” citing
21 RCW 90.90.0110(2).

22 On balance, the Court finds that Defendants have the better of the argument.
23 Again, it would be unreasonable and inefficient to require a federal agency to
24 merely reiterate a state agency's work, particularly where that work is the product
25 of ongoing collaboration between the two sets of agencies. It is clear from the
26 record that federal Defendants carefully reviewed the state agencies' consideration
27 of alternatives, and accepted their conclusions as reasonable. Moreover, during the
28 federal process the agency received comments on and reviewed the same kinds of

1 alternatives Plaintiffs now propose. And perhaps most importantly, this project
2 represents the culmination of a long collaborative process between multiple
3 stakeholders, including state and tribal agencies, public utility districts, irrigation
4 districts, and environmental groups. The final EA details this diverse policy
5 group's influence on policy choices, priorities, and the consideration of alternatives
6 (LR-A000015). Given this backdrop, the Court does not find the final EA's
7 consideration of alternatives to be arbitrary or capricious.

8 Returning to the timing of the EA, discussed above, the Court rejects
9 Plaintiffs' argument that Defendants' procurement of water rights permits before
10 preparing NEPA documents unreasonably limited the scope of alternatives
11 Defendants considered. Rather, Defendants and their state counterparts considered
12 and reasonably rejected the very alternatives Plaintiffs propose. As Defendants
13 point out, this project was not developed in a vacuum, but rather built upon and
14 incorporated an extensive history of collaboration between multiple stakeholders.
15 Merely obtaining the water rights permits did not commit Defendants to a specific
16 choice of action; rather, Defendants retained the discretion to move forward with
17 the project or not. As such, the final EA and FONSI preceded the "go-no-go" step
18 of the process, and thereby complied with NEPA. Therefore, the Court denies
19 Plaintiffs' motion on this issue.

20 IV. CONCLUSION

21 The Court finds that Defendants complied with NEPA's timing requirement
22 by preparing a final EA and FONSI before the "go-no-go" stage of the Lake
23 Roosevelt Drawdown Project's development. The Court further finds that the final
24 EA and FONSI adequately considered alternatives to the project, as well as the
25 project's cumulative and impacts. Therefore, the Court grants Defendants' motion
26 and denies Plaintiffs.

27 Accordingly, **IT IS HEREBY ORDERED:**

28 1. Plaintiffs' Motion for Summary Judgment (Ct. Rec. 68) is **DENIED**.

1 2. Defendants' Cross-Motion for Summary Judgment (Ct. Rec. 82) is
2 **GRANTED.**

3 3. Plaintiffs' Motion to Strike (Ct. Rec. 96) is **DENIED as moot.**

4 4. The District Court Executive is directed to enter judgment in favor of
5 Defendants and against Plaintiffs.

6 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
7 Order, provide copies to counsel, and **close the file.**

8 **DATED** this 21st day of May, 2010.

9
10 *s/Robert H. Whaley*
11 **ROBERT H. WHALEY**
United States District Court

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